



**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 10**

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Seattle, WA 98101

WATER
DIVISION

September 30, 2021

Mr. Vince McGowan
Water Quality Program Manager
Washington State Department of Ecology
PO Box 47600
Olympia, Washington 98504-7600

Re: EPA's Clean Water Act Action on Revisions to Washington's Surface Water Quality Standards for Guidelines for Aquatic Life Temperature Criteria, and Short Term Modifications

Dear Mr. McGowan:

The U.S. Environmental Protection Agency (EPA) has completed the review and reconsideration of provisions for guidelines for aquatic life temperature criteria (WAC 173-201A-200(1)(c)(vii) & 210(1)(c)(v)) and short term modifications (WAC 173-201A-410), which were submitted to EPA by the Washington Department of Ecology in 2003 and 2006. Under section 303(c) of the Clean Water Act (CWA), 33 U.S.C. § 1313(c), states must submit new and revised water quality standards to EPA for review and action, and EPA must ensure that those water quality standards are consistent with the CWA and EPA's implementing regulations. EPA's action is outlined below and further described in the enclosed Technical Support Document.

As you are aware, on February 10, 2014, the Northwest Environmental Advocates filed a complaint in U.S. District Court for the Western District of Washington (Case No. 2:14-cv-0196-RSM) challenging, in part, EPA's February 11, 2008 determinations that certain provisions submitted by Washington were not water quality standards subject to CWA section 303(c) review. On October 17, 2018, the Court issued an Order Granting a Stay (Dkt. 95) pending EPA's reconsideration of its prior determinations that the provisions were not water quality standards. The Order notes that EPA may complete its reconsideration by October 17, 2021, by making approval or disapproval decisions, or a final determination that such provisions are not water quality standards.

EPA's action applies only to waters in the State of Washington and does not apply to waters that are within Indian Country, as defined in 18 U.S.C. § 1151. In addition, nothing in this action shall constitute an approval or disapproval of a water quality standard that applies to waters within Indian Country. EPA, or authorized Indian Tribes, as appropriate, will retain responsibilities for water quality standards for waters within Indian Country.

Summary of EPA's Action

Pursuant to EPA's authority under section 303(c)(3) of the CWA, 33 U.S.C. § 1313(c)(3), and 40 CFR Part 131, EPA is approving the minor non-substantive revisions to the following sections of WAC Chapter 173-201A.

- WAC 173-210A-410: Short Term Modifications, with the exception of WAC 173-210A-410(3). See below.

Pursuant to EPA's authority under section 303(c)(3) of the CWA, 33 U.S.C. § 1313(c)(3), and 40 CFR Part 131, EPA is disapproving revisions to the following sections of WAC Chapter 173-201A.

- a) Guidelines for aquatic life temperature criteria
 - WAC 173-201A-200(1)(c)(vii)(C): Fresh water temperature guidelines
 - WAC 173-201A-210(1)(c)(v)(C): Marine water temperature guidelines
- b) Short Term Modifications
 - WAC 173-210A-410(3): Short Term Modifications

EPA is taking no action to approve or disapprove revisions to the following sections of WAC Chapter 173-201A because EPA has determined they are not new or revised water quality standards that EPA has the authority to review and approve or disapprove pursuant to CWA section 303(c), 33 U.S.C. § 1313(c)(3).

- WAC 173-201A-200(1)(c)(vii) Fresh water temperature guidelines with the exception of WAC-201A-200(1)(c)(vii)(C)
- WAC 173-201A-210(1)(c)(v): Marine water temperature guidelines with the exception of WAC 173-201A-210(1)(c)(v)(C)

EPA appreciates Ecology's commitment and ongoing work to update Washington's water quality standards. We also appreciate the collaboration by your staff to address the complexities associated with criteria revisions. If you have any questions regarding this letter, please contact me at (206) 553-1855 or Lindsay Guzzo, EPA staff lead, at (206) 553-0268 or by email at Guzzo.Lindsay@epa.gov.

Sincerely,

Daniel D. Opalski
Director

Enclosure: Technical Support Document

cc (e-Copy): Ms. Melissa Gildersleeve, Water Quality Management Section Manager, Ecology
Mr. Chad Brown, Water Quality Management Unit Supervisor, Ecology

Technical Support Document

EPA's Clean Water Act Action on Revisions to the
Washington State Department of Ecology's Surface
Water Quality Standards for Guidelines for Aquatic Life
Temperature Criteria, and Short Term Modifications

September 30, 2021

I. Clean Water Act Requirements for Water Quality Standards

The objective of the Clean Water Act (CWA) is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters with an interim goal, where attainable, to achieve water quality that provides for the protection and propagation of fish, shellfish, and wildlife and recreation in and on the water. Under section 303(c) of the CWA and federal implementing regulations at 40 CFR § 131.4, states (and authorized tribes) have the primary responsibility for reviewing, establishing, and revising water quality standards (WQS). These standards include the designated uses of a waterbody or waterbody segment, the water quality criteria that protect those designated uses, and an antidegradation policy. This statutory and regulatory framework allows states to work with local communities to adopt appropriate designated uses (as required at 40 CFR § 131.10(a)) and to adopt criteria to protect those designated uses (as required at 40 CFR § 131.11(a)).

States are required to hold public hearings for the purpose of reviewing applicable WQS periodically but at least once every three years and, as appropriate, modify and adopt these standards (40 CFR § 131.20). Each state must follow applicable legal procedures for revising or adopting such standards (40 CFR § 131.5(a)(6)) and submit certification by the state's attorney general, or other appropriate legal authority within the state, that the WQS were duly adopted pursuant to state law (40 CFR § 131.6(e)). The U.S. Environmental Protection Agency's (EPA) review authority and the minimum requirements for state WQS submittals are described at 40 CFR § 131.5 and 131.6, respectively.

States are required by 40 CFR § 131.11(a) to adopt water quality criteria that protect their designated uses. In adopting such criteria, states should establish numeric values based on one of the following:

- (1) CWA section 304(a) guidance;
- (2) CWA section 304(a) guidance modified to reflect site-specific conditions; or,
- (3) Other scientifically defensible methods (40 CFR § 131.11(b)(1)).

In addition, states should establish narrative criteria where numeric criteria cannot be established or to supplement numeric criteria (see 40 CFR § 131.11(b)(2)).

Section 303(c) of the CWA requires states to submit new or revised WQS to EPA for review and action. EPA is required to review these changes to ensure revisions to WQS are consistent with the CWA and EPA's implementing regulations.

EPA considers four questions (described below) when evaluating whether a particular provision is a new or revised WQS. If all four questions are answered "yes" then the provision would likely constitute a new or revised WQS that EPA has the authority and duty to approve or disapprove under CWA § 303(c)(3).¹

1. Is it a legally binding provision adopted or established pursuant to state or tribal law?
2. Does the provision address designated uses, water quality criteria (narrative or numeric) to protect designated uses, and/or antidegradation requirements for waters of the United States?

¹ *What is a New or Revised Water Quality Standard under 303(c)(3)? Frequently Asked Questions*, EPA No. 820F12017 (Oct. 2012). Available at <https://www.epa.gov/sites/production/files/2014-11/documents/cwa303faq.pdf>

3. Does the provision express or establish the desired condition (e.g., uses, criteria) or instream level of protection (e.g., antidegradation requirements) for waters of the United States immediately or mandate how it will be expressed or established for such waters in the future?
4. Does the provision establish a new WQS or revise an existing WQS?

If EPA approves a state's WQS submission, such standard(s) shall thereafter be the applicable standard for CWA purposes. When EPA disapproves a state's WQS, EPA shall notify the state and specify why the WQS is not in compliance with the requirements of the CWA and federal WQS regulations and specify any changes that are needed to meet such requirements (33 U.S.C. § 1313(c)(3); 40 CFR § 131.21).

Finally, EPA considers non-substantive edits to existing WQS to constitute new or revised WQS that EPA has the authority to approve or disapprove under § 303(c)(3). While such edits and changes do not substantively change the meaning or intent of the existing WQS, EPA believes it is reasonable to treat such edits and changes in this manner to ensure public transparency as to which provisions are applicable for purposes of the CWA. EPA notes that the scope of its review and action on non-substantive edits or editorial changes extends only to the edits or changes themselves. EPA is not re-opening or reconsidering the underlying WQS which are the subject of the non-substantive edits or editorial changes.

II. Background

On February 10, 2014, the Northwest Environmental Advocates filed a complaint in U.S. District Court for the Western District of Washington (Case No. 2:14-cv-0196-RSM) challenging, in part, EPA's February 11, 2008 determinations that certain provisions submitted by Washington were not water quality standards. On October 17, 2018, the Court issued an Order Granting a Stay (Dkt. 95) pending EPA's reconsideration of its prior determinations that the provisions were not water quality standards. The Order noted that EPA may complete its reconsideration by October 17, 2021, by making approval or disapproval decisions, or a final determination that such provisions are not water quality standards.

This Technical Support Document constitutes EPA's reconsideration and action on the remaining two provisions that EPA previously determined not to be WQS subject to the Court Order. EPA previously completed its review and reconsideration of the other two provisions in actions dated April 30, 2019 and October 13, 2020.

III. EPA's Action Upon Reconsideration

In its February 11, 2008 action, EPA concluded that the freshwater and marine water temperature guidelines for aquatic life at WAC 173-201A-200(1)(c)(vii) and WAC 173-201A-210(1)(c)(v), respectively, as well as the revised short term modification language at WAC 173-210A-410 were not WQS. In October 2012, EPA issued a Frequently Asked Questions (FAQ) document to assist with determining whether a provision constitutes a new or revised WQS that EPA has the authority and duty to approve or disapprove under CWA section 303(c)(3).² The 2012 FAQ document consolidated EPA's plain language interpretation – informed by the CWA, EPA's implementation regulations at 40 CFR Part 131 and relevant case law – of what constitutes a new or revised WQS that EPA has the authority

² *What is a New or Revised Water Quality Standard under 303(c)(3)? Frequently Asked Questions*, EPA No. 820F12017 (Oct. 2012). Available at <https://www.epa.gov/sites/production/files/2014-11/documents/cwa303faq.pdf>

and duty to approve or disapprove under section 303(c) of the CWA. Upon reconsideration, and informed by EPA's consideration of the 2012 FAQ document, EPA has determined that parts of WAC 173-201A-200(1)(c)(vii) and WAC 173-201A-210(1)(c)(v), and all of WAC 173-210A-410 are WQS subject to EPA's CWA review.

EPA's actions and the associated rationales are provided below. Today's action applies only to waters within the jurisdiction of the state of Washington and does not apply to waters that are within Indian Country, as defined in 18 U.S.C. § 1151. Nothing in this decision document shall constitute an approval or disapproval of a WQS that applies to waters within Indian Country. EPA, or authorized Indian Tribes, as appropriate, retain the authority to establish WQS for waters within Indian Country.

1. Temperature Guidelines

In its February 11, 2008 action, EPA concluded that the fresh and marine water aquatic life temperature guidelines at WAC-201A-200(1)(c)(vii) and WAC 173-201A-210(1)(c)(v), respectively, were not WQS. More detail and information regarding EPA's action can be found in the 2008 decision document.³ In the action, EPA stated that the provisions were not WQS because they do not change the level of protection afforded to Washington's waters; rather, the provisions offer guidelines, in the form of general scientific statements that should be considered when applying narrative provisions.

The underlined text indicates the new and/or revised language from Ecology's 2006 WQS submittal, and strikeout text indicates Ecology's previous text, which had been replaced by the new or revised text.

Guidelines on aquatic life temperature criteria

WAC 173-201A-200 (1)(c)(vii), Fresh water temperature guidelines for aquatic life temperature criteria: The department will incorporate the following guidelines on preventing acute lethality and barriers to migration of salmonids into determinations of compliance with the narrative requirements for use protection established in this chapter (e.g., WAC 173-201A-310(1), 173-201A-400(4), and 173-201A-410(1)(c)). The following site-level considerations do not, however, override the temperature criteria established for waters in subsection (1)(c) of this section or WAC 173-201A-602:

(A) Moderately acclimated (16-20°C, or 60.8-68°F) adult and juvenile salmonids will generally be protected from acute lethality by discrete human actions maintaining the 7-DADMax temperature at or below 22°C (71.6°F) and the 1-day maximum (1-DMax) temperature at or below 23°C (73.4°F).

(B) Lethality to developing fish embryos can be expected to occur at a 1-DMax temperature greater than 17.5°C (63.5°F).

(C) To protect aquatic organisms, discharge plume temperatures must be maintained such that fish could not be entrained (based on plume time of travel) for more than two seconds at temperatures above 33°C (91.4°F) to avoid creating areas that will cause near instantaneous lethality.

³ February 11, 2008. Letter from Michael F. Gearheard, Director, Office of Water & Watersheds, EPA Region 10, to David C. Peeler, Program Manager, Department of Ecology, re: EPA Approval of the 2003/2006 Revisions to the Washington Water Quality Standards Regulations. Available at: <https://www.epa.gov/sites/production/files/2017-10/documents/wawqs-letter-02112008.pdf>

(D) Barriers to adult salmonid migration are assumed to exist any time the 1-DMax temperature is greater than 22°C (71.6°F) and the adjacent downstream water temperatures are 3°C (5.4°F) or more cooler.

WAC 173-201A-210(1)(c)(v), Marine water temperature guidelines for aquatic life temperature criteria: The department will incorporate the following guidelines on preventing acute lethality and barriers to migration of salmonids into determinations of compliance with the narrative requirements for use protection established in this chapter (e.g., WAC 173-201A-310(1), 173-201A-400(4), and 173-201A-410(1)(c)). The following site-level considerations do not, however, override the temperature criteria established for waters in subsection (1)(c) of this subsection or WAC 173-201A-612:

(A) Moderately acclimated (16-20°C, or 60.8-68°F) adult and juvenile salmonids will generally be protected from acute lethality by discrete human actions maintaining the 7-DADMax temperature at or below 22°C (71.6°F) and the 1-DMax temperature at or below 23°C (73.4°F).

(B) Lethality to developing fish embryos can be expected to occur at a 1-DMax temperature greater than 17.5°C (63.5°F).

(C) To protect aquatic organisms, discharge plume temperatures must be maintained such that fish could not be entrained (based on plume time of travel) for more than two seconds at temperatures above 33°C (91.4°F) to avoid creating areas that will cause near instantaneous lethality.

(D) Barriers to adult salmonid migration are assumed to exist any time the 1-DMax temperature is greater than 22°C (71.6°F) and the adjacent downstream water temperatures are 3°C (5.4°F) or more cooler.

EPA Action: After reconsideration of the 2008 decision that the guidelines for aquatic life temperature criteria provisions were not WQS, EPA is reaffirming that determination with the exception of the provisions at WAC-201A-200(1)(c)(vii)(C) and WAC 173-201A-210(1)(c)(v)(C). Regarding WAC-201A-200(1)(c)(vii)(C) and WAC 173-201A-210(1)(c)(v)(C), EPA has concluded that these provisions are new or revised WQS and in accordance with its CWA authority, 33 U.S.C. § 1313(c)(3) and 40 CFR Part 131, EPA disapproves these provisions.

EPA Rationale: In a letter dated December 1, 2004, EPA raised questions regarding the freshwater and marine water thermal guideline provisions and requested that Ecology “please explain how this guidance will be applied in connection with the mixing zone policy provisions and particularly how areas of higher temperature will be limited spatially to protect salmonid beneficial uses...”.⁴ In a February 9, 2005 response,⁵ Ecology clarified that “[a]s described in the standards, the temperature provisions apply beyond their use in helping to evaluate the possible impacts of mixing zones. The provisions also contain components that serve as guidance in addition to components that are mandatory. Paragraph (vii)(C) creates a non-discretionary directive for Ecology permit writers and will be applied in all permits that require mixing zones. Paragraphs (vii)(A), (B) and (D) serve as technical guidance to be considered in the application of narrative standards to protect designated uses.” Ecology further elaborated that “[t]he purpose for the 200(c)(vii) provisions is not explicitly or directly related to mixing zones outside

⁴ December 1, 2004. Letter from Michael Gearheard, Director, Office of Water & Watersheds, EPA Region 10 to David Peeler, Program Manager, Department of Ecology, re: Provisions that need clarification. Page 3.

⁵ February 9, 2005. Letter from Melissa Gildersleeve, Department of Ecology, to Paula Van Haagen, USEPA Region 10, Re: Response to Provisions that need clarification. Pages 6-7.

of the restriction on plume temperature (discussed above). Except for 200(iv)(C), the 200(c)(vii) provisions are primarily informative, and we are not aware of any specific situations where they would be used. Since from time to time we need to determine if unique actions can be allowed (one time discharges, variations from normal effluent conditions to respond to maintenance needs, etc.) we decided it would be beneficial to document what types of temperatures can cause lethality to fish or blockages to their migration. By putting this information in the rule it will be readily available if and when it is ever needed to ensure that the aquatic resources of the state will be fully protected.”

Both the provisions at WAC-201A-200(1)(c)(vii)(C) and WAC 173-201A-210(1)(c)(v)(C) state that discharge plume temperatures “must” be maintained at specified levels and Ecology stated in its response to EPA that the mandatory language was designed to be binding. Additionally, in 2003 EPA Region 10 developed the Guidance for Pacific Northwest State and Tribal Temperature Water Quality Standards⁶ (Temperature Guidance), which includes recommendations for avoiding thermal plume impacts. Among other recommendations, the Temperature Guidance suggests that “the maximum temperature within the plume after 2 seconds of plume travel from the point of discharge does not exceed 32°C.” The thermal plume impact recommendations came from a variety of sources including a draft discussion paper and literature summary prepared by Ecology⁷ that states, “The changing velocity and temperature of the discharge plume should be examined to ensure that time spent at or above 33°C does not exceed 1 second (it should generally be assume the organism is entrained and is moving along with the plume in the analysis).” Ecology’s standard is less stringent than both the recommendations in the Temperature Guidance and the literature summary and no further justification was provided by Ecology to support the less stringent standard. EPA concludes that Ecology has not provided sufficient scientific rationale to support its adoption of WAC 173-201A-200(1)(c)(vii)(C) and WAC 173-210(1)(c)(v)(c), and on this basis is disapproving these provisions.

The remaining provisions are informative statements and provide no legally binding requirements. Although the provision states that Ecology “will incorporate the following guidelines...into determinations of compliance with narrative provisions,” the remaining guidelines themselves are not drafted using binding or explicit statements concerning the requisite level of protection (salmonids “will generally be protected”, lethality “can be expected to occur”, barriers are “assumed to exist”). Ecology confirmed this understanding in its February 9, 2005 response discussed above. Furthermore, the provisions include an explicit statement that they do not override the applicable numeric temperature criteria and, therefore, do not change the level of protection afforded to Washington’s waters. EPA has therefore reaffirmed that the remaining provisions are not new or revised WQS that are subject to CWA section 303(c) review.

Remedy to Address the Disapproval: The effect of both EPA’s disapproval and reaffirmation of certain provisions as not WQS, is that the provisions at WAC-201A-200(1)(c)(vii) and WAC 173-201A-210(1)(c)(v) are not applicable WQS for CWA purposes. Because Washington has existing and applicable biologically based numeric temperature criteria that EPA determined to be protective of designated uses⁸, no changes to Washington’s WQS are necessary to meet the requirements of the CWA

⁶ U.S. Environmental Protection Agency. 2003. EPA Region 10 Guidance for Pacific Northwest State and Tribal Temperature Water Quality Standards. EPA 910-B-03-002. Region 10 Office of Water, Seattle, WA. <https://nepis.epa.gov/Exe/ZyPDF.cgi/P1004IUI.PDF?Dockey=P1004IUI.PDF>

⁷ Washington Department of Ecology (WDOE). December 2002. Evaluating Standards for Protection Aquatic Life in Washington’s Surface Water Quality Standards, Temperature Criteria, Draft Discussion Paper and Literature Summary. <https://apps.ecology.wa.gov/publications/documents/0010070.pdf>

⁸ February 11, 2008. Letter from Michael F. Gearheard, Director, Office of Water & Watersheds, EPA Region 10, to David C. Peeler, Program Manager, Department of Ecology, re: EPA Approval of the 2003/2006 Revisions to the Washington

and, therefore, EPA is specifying no changes that the State must adopt to meet CWA requirements. Ecology could consider removing these provisions from its WQS regulations to avoid confusion and provide greater clarity to what is in effect for CWA purposes.

2. Short Term Modifications

In its February 11, 2008 action, EPA concluded that the revised short term modification provision at WAC 173-210A-410, was not a new or revised WQS. More detail and information regarding EPA's February 11, 2008 conclusions can be found in the decision document.⁹

Prior to the 2008 decision, EPA requested clarification from Ecology regarding implementation of the short term modification provision. On January 19, 2006, EPA received a letter¹⁰ from Ecology which provided the following information:

- The short term modification provision does not revise the underlying numeric criteria, but does allow short term excursions of the criteria in permits and 401 certifications.
- Short term modification provisions have been included in National Pollutant Discharge Elimination System (NPDES) permits, CWA section 404 permits, and in licensing agreements established under section 401 water quality certifications.
- The duration of a criterion exceedance is determined on a case-by-case basis.

EPA had approved Washington's prior short term modification provision in 1997. However, in 2008, EPA determined this provision was not a WQS based on Washington's clarification letter, and therefore did not approve or disapprove the provision. At the time, EPA stated that the short term modification provision gave the state the discretion to exercise its enforcement authority to allow exceedances of WQS for certain activities.

The underlined text indicates the new and/or revised language from Ecology's 2006 WQS submittal, and strikeout text indicates Ecology's previous text, which had been replaced by the new or revised text.

WAC 173-210A-410, Short Term Modifications:

The criteria and special conditions established in WAC (~~((173-201A-030))~~) 173-201A-200 through (~~((173-201A-140))~~) 173-201A-260, 173-201A-602 and 173-201A-612 may be modified for a specific water body on a short-term basis (e.g., actual periods of nonattainment would generally be limited to hours or days rather than weeks or months) when necessary to accommodate essential activities, respond to emergencies, or to otherwise protect the public interest, even though such activities may result in a temporary reduction of water quality conditions (~~((below those criteria and classifications established by this regulation. Such activities must be conditioned, timed, and restricted (i.e., hours or days rather than weeks or months) in a manner that will minimize water quality degradation to existing and characteristic uses. In no case will~~

Water Quality Standards Regulations. Available at: <https://www.epa.gov/sites/production/files/2017-10/documents/wawqs-letter-02112008.pdf>

⁹ February 11, 2008. Letter from Michael F. Gearheard, Director, Office of Water & Watersheds, EPA Region 10 to David C. Peeler, Program Manager, Department of Ecology, re: EPA Approval of the 2003/2006 Revisions to the Washington Water Quality Standards Regulations. Available at: <https://www.epa.gov/sites/production/files/2017-10/documents/wawqs-letter-02112008.pdf>

¹⁰ January 19, 2006. Letter from David C. Peeler, Water Quality Program Manager, Ecology to Michael Gearheard, EPA Region 10, Re: Ecology Responses to USEPA Region X Questions Regarding Washington's 2003 Adopted Water Quality Standards.

~~any degradation of water quality be allowed if this degradation significantly interferes with or becomes injurious to characteristic water uses or causes long-term harm to the environment)).~~

(1) A short-term modification will:

(a) Be authorized in writing by the department, and conditioned, timed, and restricted in a manner that will minimize degradation of water quality, existing uses, and designated uses;

(b) Be valid for the duration of the activity requiring modification of the criteria and special conditions in WAC 173-201A-200 through 173-201A-260, 173-201A-602 or 173-201A-612, as determined by the department;

(c) Allow degradation of water quality if the degradation does not significantly interfere with or become injurious to existing or designated water uses or cause long-term harm to the environment; and

(d) In no way lessen or remove the proponent's obligations and liabilities under other federal, state, and local rules and regulations.

(2) The department may authorize a longer duration where the activity is part of an ongoing or long-term operation and maintenance plan, integrated pest or noxious weed management plan, water body or watershed management plan, or restoration plan. Such a plan must be developed through a public involvement process consistent with the Administrative Procedure Act (chapter 34.05 RCW) and be in compliance with SEPA, chapter 43.21C RCW, in which case the standards may be modified for the duration of the plan, or for five years, whichever is less. Such long-term plans may be renewed by the department after providing for another opportunity for public and intergovernmental involvement and review.

(3) The department may allow a major watershed restoration activity that will provide greater benefits to the health of the aquatic system in the long-term (examples include removing dams or reconnecting meander channels) that, in the short term, may cause significant impacts to existing or designated uses as a result of the activities to restore the water body and environmental conditions. Authorization will be given in accordance with subsection (2) of this section.

(4) A short-term modification may be issued in writing by the director or his/her designee to an individual or entity proposing the aquatic application of pesticides, including but not limited to those used for control of federally or state listed noxious and invasive species, and excess populations of native aquatic plants, mosquitoes, burrowing shrimp, and fish, subject to the following terms and conditions:

~~(a) ((A short-term modification will in no way lessen or remove the project proponent's obligations and liabilities under other federal, state and local rules and regulations.~~

~~(b)))~~ A request for a short-term modification shall be made to the department on forms supplied by the department. Such request shall be made at least thirty days prior to initiation of the proposed activity, and after the project proponent has complied with the requirements of the State Environmental Policy Act (SEPA);

~~((c) A short-term modification shall be valid for the duration of the activity requiring modification of the criteria and special conditions in WAC 173-201A-030 through 173-201A-140, or for one year, whichever is less. Ecology may authorize a longer duration where the activity is part of an ongoing or long-term operation and maintenance plan, integrated pest or noxious weed management plan, waterbody or watershed management plan, or restoration plan. Such a plan must be developed through a public involvement process consistent with the Administrative Procedure Act (chapter 34.05 RCW) and be in compliance with SEPA, chapter 43.21C RCW, in which case the standards may be modified for the duration of the plan, or for five years, whichever is less;~~

~~(d)))~~ (b) Appropriate public notice as determined and prescribed by the director or his/her designee shall be given, identifying the pesticide, applicator, location where the pesticide will be applied, proposed timing and method of application, and any water use restrictions specified in USEPA label provisions;

~~((e)))~~ (c) The pesticide application shall be made at times so as to:

(i) Minimize public water use restrictions during weekends; and

(ii) Avoid public water use restrictions during the opening week of fishing season, Memorial Day weekend, Independence Day weekend, and Labor Day weekend;
~~((f))~~ (d) Any additional conditions as may be prescribed by the director or his/her designee.

~~((2))~~ (5) A short-term modification may be issued for the control or eradication of noxious weeds identified as such in accordance with the state noxious weed control law, chapter 17.10 RCW, and Control of spartina and purple loosestrife, chapter 17.26 RCW. Short-term modifications for noxious weed control shall be included in a water quality permit issued in accordance with RCW 90.48.445, and the following requirements:

(a) The department may issue water quality permits for noxious weed control ~~((may be issued))~~ to the Washington state department of agriculture (WSDA) for the purposes of coordinating and conducting noxious weed control activities consistent with ~~((their))~~ WSDA's responsibilities under chapters 17.10 and 17.26 RCW. Coordination may include noxious weed control activities identified in a WSDA integrated noxious weed management plan and conducted by individual landowners or land managers.

(b) The department may also issue water quality permits ~~((may also be issued))~~ to individual landowners or land managers for noxious weed control activities where such activities are not covered by a WSDA integrated noxious weed management plan.

EPA Action: In accordance with its CWA authority, 33 U.S.C. § 1313(c)(3) and 40 CFR Part 131, EPA approves the non-substantive editorial changes at WAC 173-201A-410, with the exception of WAC 173-210A-410(3). In accordance with its CWA authority, 33 U.S.C. § 1313(c)(3) and 40 CFR Part 131, EPA disapproves the provision at WAC 173-210A-410(3).

EPA Rationale: EPA approves the revisions at WAC 173-201A-410, with the exception of WAC 173-201A-410(3), as non-substantive revisions because, while such edits and changes do not substantively change the meaning or intent of the existing WQS, EPA believes it is reasonable to approve such edits and changes to ensure public transparency as to which provisions are applicable for purposes of the CWA. EPA notes that the scope of its review and action on non-substantive edits or editorial changes extend only to the non-substantive edits or changes themselves. EPA is not re-opening or reconsidering the underlying WQS which are the subject of the non-substantive edits or editorial changes. This action is consistent with EPA's 2012 FAQ document on what is a new or revised WQS that EPA has the duty and authority to review and approve or disapprove under section 303(c) of the CWA.¹¹

EPA is disapproving WAC 173-201A-410(3), which was newly added in 2006 and purports to authorize short term modifications associated with major watershed restoration activities, including dam removal or reconnection of meander channels. These types of major restoration activities have the potential to cause significant excursions of WQS and impacts to existing and designated uses. Such major restoration activities, which typically would occur over an extended period of time (e.g., not hours or days) would require a water quality standards variance that specifies requirements that apply during the term of the variance and which represent the highest attainable condition. In fact, the regulations at 40 CFR §131.14(b)(2)(i)(A)(2) contemplate this scenario and specify that the supporting documentation for such a WQS variance must include a demonstration that attaining the designated use and criterion is not feasible because "[a]ctions necessary to facilitate lake, wetland, or stream restoration though dam removal or other significant reconfiguration activities preclude attainment of the designated use and criterion while the actions are being implemented."

¹¹ *What is a New or Revised Water Quality Standard under 303(c)(3)? Frequently Asked Questions*, EPA No. 820F12017 (Oct. 2012). Available at <https://www.epa.gov/sites/production/files/2014-11/documents/cwa303faq.pdf>

Remedy to Address the Disapproval: The effect of EPA's disapproval is that the provision at WAC 173-210A-410(3) is not an applicable WQS for CWA purposes. Washington has EPA approved water quality standards variance procedures in place that can be used to address major watershed restoration activities, if needed, and no changes to Washington's WQS are necessary to meet the requirements of the CWA. Therefore, EPA is specifying no changes that the State must adopt to meet CWA requirements. Ecology could consider removing the disapproved portion of the provision from its regulations to avoid confusion and provide greater clarity to what is in effect for CWA purposes.